Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

Case No.

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term 1998

PMC Trust; Paul M.
Christiansen,
Petitioners,

vs.

Foothills Townhome Association,
Respondent

Petition For A Writ of Certiorari
to the California Court of Appeal,
Fourth Appellate District,
Division Three; Appendix.

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Counsel for Petitioner
PMC Trust and
Paul M. Christiansen

3988

Issues Presented

1.) Where the owners of a homeowners association pass a special assessment pursuant to power conferred by California statute, is not such passage state action subject to the Due Process Clause of the Fourteenth Amendment?

2.) Where a superior court rules in a written opinion that a homeowner's assessment is unreasonable in amount and that reserves must be replenished over time, not all at once, must not a court in a subsequent action give res judicata and collateral estoppel effect to the ruling under the Due Process Clause of the Fourteenth Amendment even where a majority of the homeowners reenact the assessment previously declared invalid? (Raised as a matter of plain error, Rule 24.1(a).)

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Opinions Below

The opinion of Judge Todd on the de novo appeal from the first assessment is not officially reported, but is reproduced in the Appendix as Exhibit A, page 19.

The opinion of the Court of Appeal on the appeal from the second assessment is officially reported as Foothills Townhome Association v. Paul M. Christiansen, 65 Cal.App.4th 688, 76 Cal.Rptr.2d 516 (1988). This opinion is reproduced in the Appendix as Exhibit B, page 23.

The California Supreme Court denied the petition for review on September 2, 1998. Appendix, Exhibit C, page 37.

Jurisdiction

28 U.S.C. Section 1257 gives the court discretionary authority to review a decision of the highest state court where the constitutionality of a state statute has been called into question.

Statutes, Constitutions, etc.

1.) California Civil Code Section 1366(a) provides that a homeowners association "must" levy regular and special assessments sufficient to perform its obligation under its governing documents and under the Common Interest Development Act.

2.) California Civil Code Section 1366(b) provides that the board of directors of a homeowners association may not impose a regular assessment that is 20% higher than the regular assessment for the preceding year, or impose a special assessment which in the aggregate exceeds 5% of the budgeted gross expenses for that year without the approval of the owners, constituting a quorum and casting a majority of the votes...This section does not limit the board's power to pass emergency assessments subject to stated limitations.

3.) The Fourteenth Amendment of the United States Constitution states that no state shall deprive any person of life, liberty or property without due process of law.

Statement of the Case

This is a dispute between a homeowner and a homeowner's association about two special assessments intended to replace depleted reserves. The first assessment was passed in 1993 and assessed each of 196 homeowners $1,300. This assessment was enacted by the board of directors of the association as an emergency measure to replenish reserves depleted by alleged storm repairs. Petitioner PMC Trust paid the assessment under protest and sued in Small Claims Court to recover the payment, claiming the board exceeded its statutory powers as there was no true emergency. The trust prevailed, and the board appealed to the Superior Court, where the court -- Judge Todd -- found in a written opinion that, indeed, the board had exceeded its powers and the special assessment was invalid. The court rendered a judgment in the trust's favor.

The board then refunded the trust's payment pursuant to the order of the small claims court and petitioner Paul M. Christiansen executed a satisfaction of judgment.

Meanwhile, the board, during the pendency of the appeal, called a special meeting of the homeowners in February 1995 to pass a second time a special assessment of $1,300, stating explicitly that it was intended to retroactively approve the '93 emergency assessment. The measure passed and the management company sent Christiansen a bill. Again, Christiansen paid under protest. He then successfully moved to vacate the satisfaction of

judgment in the municipal court, claiming that the '95 assessment was a subterfuge to circumvent the superior court's ruling on the '93 assessment. (These proceedings were unreported under applicable small claims procedure.)

A writ of execution on the board's bank account then issued, and the board, again, refunded Christiansen's payment. The board filed a new appeal but did not pursue it.

The board then brought an action in the municipal court to collect the '95 assessment, joining a second cause of action for declaratory relief against all the homeowners claiming that the '95 assessment binds them all. (No homeowner other than Christiansen was served; in fact Christiansen was not a record owner of the housing unit, as the deed attached to the complaint showed. The Municipal Court on its own motion transferred the action to the Superior Court, holding it had no jurisdiction over the declaratory judgment cause of action.)

After the Superior Court overruled a demurrer and denied a motion to strike, Christiansen moved for summary judgment on the grounds that the judgment on the '93 assessment barred the action on the '95 assessment, as both assessments were identical levies. The board cross-motioned for summary judgment, arguing that the '95 assessment was enacted by the members of the association and as such was a different assessment from the '93 assessment, which had been declared invalid. This action, the board claimed,

was not barred by res judicata, therefore.

Christiansen opposed the cross-motion on the grounds that at the motion to vacate the satisfaction of judgment, three board members testified, not only about the '93 assessment, but also about the '95 assessment. Therefore, the matter had been adjudicated and decided against the board.

The trial judge in the second action, Judge Wilkinson, denied Christiansen's motion and granted the Board's cross-motion, holding that the '95 assessment was different from the one in '93.

Christiansen then moved for reconsideration, producing the Register of Actions from the Small Claims Court, which showed that three board members testified on the motion to vacate the satisfaction of judgment. The Register also showed that the board filed a notice of appeal from the order vacating the satisfaction. The attorney for the board opposed, stating that the clerk had stated that she must enforce the one appeal rule in small claims actions, because the motion to vacate had been filed in the action which had been previously appealed to Judge Todd. Christiansen filed a reply that showed that as early as the board's motion for reconsideration before Judge Todd on the first appeal, the judge had before him evidence of the '95 assessment, further proof that the present action was barred. The trial court, however, denied the motion. A judgment was entered accordingly on June 25, 1997.

The board also successfully claimed its attorney's fees and costs in excess of $15,000. On appeal to Division Three of California's Fourth Appellate District, Justice Wallin held that small claims judgments are not given res judicata effect, citing a Court of Appeals case to that effect, but ignoring a Supreme Court case to the contrary. The court also held that even if there were a res judicata effect, a ruling that the '93 assessment was invalid would not bar collection of the same assessment re-enacted by the membership in '95. The court then held in footnote 6 that the trial court correctly denied Christiansen's motion for reconsideration because he was late with his evidence that the '95 assessment was twice passed upon in the '93 appeal, when in fact the trial court had granted the motion for reconsideration but held that it did not change its view that the '95 assessment was valid. Thus, all the evidence bearing on the '95 assessment was, contrary to the Court of Appeals finding, part of the record.

(Christiansen twice moved in the Court of Appeal to correct its decision, supplying in each instance a copy of the trial court's minute order granting the motion for reconsideration; both motions were denied.)

Christiansen petitioned the California Supreme Court for review, but the request was denied on September 2, 1998.

The constitutionality of the state statutes and the unconstitutionality of

the assessment as such was decided by Judge Todd on his own motion and are stated at Appendix, p. 19.

The unconstitutionality of the '95 assessment was asserted as part of the res judicata and collateral estoppel claims in the second action. That is, as Judge Todd had held that the '93 assessment was unreasonable, because there was no factual basis for an emergency assessment and because the Board attempted to restore reserves all at one time, lumping together both routine and storm expenses, the '95 assessment, which was for the same purpose and in the identical amount, was unreasonable as well. Thus, while the defense in the second action for the '95 assessment was the procedural bar of res judicata, the substance of the claim was that, like the '93 assessment, '95 assessment, too, was unreasonable as a matter of substantive law. This claim was made explicit in Christiansen's reply brief on appeal in the second action where he cited 9 Witkin, Summ.Calif.Law (9th Ed.), Taxation, B. Substantive Due Process, §24, pp.37-40, arguing that the '95 assessment had no basis in fact to qualify it as a "special" assessment and was unreasonable in amount besides, as it sought to restore the reserves all at once rather than over time, as Judge Todd had previously ruled. (Reply Brief, pp.8-9.) The Court of Appeal did not find it necessary to discuss the constitutionality of the '95 assessment, holding instead that, as a matter of law, there was nothing in California Civil Code §1366.1 -- limiting levies to amounts needed to defray costs, a statute Judge Todd found

violated -- that would require the incremental restoration of the reserves over time. This, too, not only contradicted Judge Todd's ruling, but it also impliedly held that such an assessment could not be unreasonable, i.e., that reassessment was somehow immune from substantive Due Process attack so long as it complied with statute. Thus, the constitutional claims were rejected but not in explicit terms.

The claim that Due Process requires the application of res judicata and collateral estoppel as a matter of fundamental fairness was not made in those terms, but, rather, was claimed as a matter of state decisional law. It is raised here under Rule 24.1(a) as plain error, but with the additional hope that the "raised below" requirement might be relaxed as it appears to be a rule of prudence, not jurisdiction. Terminiello v. Chicago 337 U.S.1 (1949); Vachon v. New Hampshire 414 U.S. 478 (1974); Illinois v. Gates, 462 U.S. 213, 222 (1983). In this connection, it should be recalled that most actions for assessments are brought in small claims court where lawyers cannot appear; Christiansen represented himself in the '93 action both in the small claims court and on the de novo appeal to the superior court. The action for the '95 assessment was also a small claims action where Christiansen again represented himself. But because the association had joined a cause of action for declaratory relief, the small claims court transferred the action to the superior court, only after which Christiansen obtained counsel. It is unrealistic in these circumstances

to expect the lay parties to be expert at raising constitutional objections. That this case is here with any sort of record is largely due to a fortuitous set of circumstances, not likely to soon recur.

Reasons To Grant The Writ

I
No Authoritative Statement That Homeowner Association Action Is State Action Has Yet Been Made

According to Elizabeth McMahon of the American Homeowners Resource Center, a group that monitors California homeowner legislation, there are 35-45,000 homeowner associations in California alone, governing 6 million people. Undoubtedly, these numbers could be multiplied several times over for figures on the country as a whole.

Yet, not a single state supreme court, nor this Court either, has considered the issue of whether homeowner association's actions, by their boards or their memberships, are subject to Due Process restraints, as are other local governments. This issue was raised as early as 1976 in a law review article, Concepts of Liability in the Development and the Administration of Condominium and Homeowner Associations, 12 Wake Forest L.R. 915, 921 (1976). The notion that association action is state action was at first received in California with skepticism. Laguna Royale Owners Assn. v. Darger, 119 Cal.App.3d 670, 683 (1981). But just two years later, the law review

article was incorporated in haec verba by another California Court of Appeal. (Cohen v. Kite Hill Community Assn., 142 Cal.App.3d 642 (1983). The Cohen court noted that a homeowner's association engages in quasi-governmental activity, paralleling the power, duties, and responsibilities of a municipal government. The association provides road maintenance, and street and common area lighting. Such special responsibilities require the protections of due process, equal protection and fair dealing. (Id., at 651.) The idea gained unquestioned assent 12 years later by yet another California Court of Appeal, which noted that homeowner associations function as a second municipal government in regulating aspects of daily levies. Chantiles v. Lake Forest II Masters Home Owner Assn., 37 Cal.App.4th 914, 922. Finally, just weeks ago, another California court noted in the facts before it that not only is homeowner association action state action, but also it had gone so far as to become "nanny" state action, regulating what its residents could read and how they must keep their homes tidy. Cunningham v. Superior Court, Los Angeles Daily Journal, Daily Appellate Report, November 3, 1998, p.11298. Surely, the time has arrived -- 22 years after the idea was first proposed -- that homeowner association action is state action subject to Due Process limitations. Only this Court can so state in an authoritative way, however.

A.
The Violations Here

Judge Todd in his ruling about the

'93 assessment held that it was "unreasonable" in amount and procedure. It attempted, the judge held, not only to replenish reserves depleted by storm repairs, but to recoup as well routine yearly maintenance costs: rain gutters were installed as a matter of prevention, as were fences. The court held that the enactment was "heavy-handed" and indicative of misfeasance. Significantly, the court held that depletion of the cash on hand was not an emergency; restoration of the reserve was to be accomplished over time. (App.p. 19.) Thus, in point of procedure, an emergency assessment -- where there was none -- was unauthorized; and in point of amount -- recouping storm as well as routine expenses -- was unreasonable. That is, the court employed two standard concepts of substantive due process to declare the assessment, in effect, void: there was no factual basis for a special levy, and its amount was unreasonable. This is essentially the inquiry this Court made in declaring a special municipal assessment violative of Due Process in Norwood v. Baker, 172 U.S. 209, 19 S.Ct. 187 (1898).

(i)

The '95 Assessment

The 1995 assessment at bar was identical in amount and purpose to the '93 assessment Judge Todd declared unreasonable , the only difference being that the '95 assessment was passed as a "special" assessment by the owners, not the board. (The res judicata issue is treated infra.) This was done under California Civil Code §1366(b) which makes

an implied grant of power to a majority of the homeowners to make "special" and "regular" assessments that the board cannot make. But the statute does not define "special" or "regular." Under the analysis just presented, the owners' action would also be state action.

But its unconstitutionality is found in a practice guide, used throughout California, which states that "regular" assessments are levied annually, collected in monthly installments, and are used to meet the association's normal operating expenses and to establish necessary reserves; "special" assessments, in contrast, generally are levied on an as needed basis to meet expenses of an extraordinary or capital nature. California Continuing Education of the Bar, Condominium and Property Development Practice, §6.114, pp. 458-459 (1984). The point is that this "special" assessment was not on an as needed basis -- the repairs had already been made out of available reserves -- and was not for capital purposes -- it was for reserves. Thus, the '95 assessment was unauthorized in points of procedure and purpose, Due Process violations, not merely statutory violations, as Due Process asks what is reasonable under the circumstances. Just as Judge Todd held the '93 assessment unreasonable because it sought to recoup operating expenses by special assessment, and just as this Court held in Norwood the special assessment was void because excessive, so, too, the '95 assessment is also void for want of a factual predicate upon which to base a special assessment, the traditional concern of substantive Due

Process. We do not urge that Due Process embodies a particular interpretation of a state law, but rather that if one is employed, it have the facts the interpretation of the law assumes. Put differently, the distinction between "regular," "special," and "emergency" powers conferred by statute are real distinctions; and, therefore, the choice to exercise one cannot be saved by reference to another if the facts needed to exercise the one employed are missing. Such action is arbitrary and unreasonable.

II
Due Process Requires Res Judicata And Collateral Estoppel Effect

"[T]he phrase [Due Process] expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." Lassiter v. Dept.of Social Services, 452 U.S. 18, 101 S.Ct. 2153, 2158 (1981).

The issue here is whether Due Process required the court hearing the '95 assessment case to give effect to Judge Todd's ruling in the '93 case, as in both cases the purpose and amount of the assessments were the same. The Court of Appeal sidestepped this issue by stating the trial court did not find that the '95

assessment was a "reincarnation" of the '93 assessment, implying that such a finding was one of fact that cannot be made for the first time on appeal. (App., p. 26.) This would not appear to be so as whether one law is essentially the same as its succeeding law would appear to be a question of law, not fact.

Be that as it may, however, the court hearing the '95 assessment -- the present case -- was required to give res judicata and collateral estoppel effect to Judge Todd's ruling on the '93 assessment that restoration of the reserves was not an emergency and that it was to be accomplished over a period of time. (App., p. 20.) The Court of Appeal after holding that res judicata was not required under state law, held that even were this not so, such that res judicata and collateral estoppel did apply, still Judge Todd's ruling that the '93 assessment impermissibly attempted to collect both operating expenses and storm damage for the reserves, such that it did bind in the '95 case, still there was nothing to show that the reserves were excessive; and further, that as a matter of law, there was nothing in state law that would require the association to replenish the reserves "incrementally" over time, as Judge Todd had ruled, rather than all at once, as the '95 assessment had done. (App., p. 30).

This ruling deprives Christiansen of a final judgment. The purpose of res judicata is in part for the benefit of the parties, to curtail multiple litigation causing vexation and expense to the

parties. 7 Witkin, Cal.Proc.4th, Judgment, §280, p.820, citing Commissioner v. Sunnen, 333 U.S. 591, 68 S.Ct. 715, 719 (1948), and, United States v. Munsingwear 340 U.S. 36, 71 S.Ct. 104 (1950). This is especially so where, as here, the first litigation is an appeal from a small claims judgment -- a procedure meant to provide a quick, inexpensive, but final decree. Of course, the fact that the '95 assessment was passed by the owners, not the board, is not determinative because the doctrine applies to parties and those in privity with them, as would the owners be to the board. 7 Witkin, Cal.Proc.4th, id., §392, p.961; see also, Duffy v. Superior Court, 3 Cal.App.4th, 425, 433-434 (1992).

Thus, contrary to what the Court of Appeal holds, the fact that Judge Todd held that there was no emergency, and therefore no basis for "special" action, would bind the owners as well; their action was factually baseless.

Also, insofar as the Court of Appeal holds as a matter of law that there is nothing in law preventing the owners from restoring the reserves all at once, rather than over time as Judge Todd ruled, runs counter to the notion that res judicata applies not because the courts are infallible, but on the contrary, are fallible; the doctrine serves the authoritativeness of the law itself by holding that right or wrong simply cannot be argued anymore. Rest.2d, Judgments, Chapter 1, pp.10-11. Thus, even if Judge Todd were wrong, his decision would still be binding. The fact that the Court of

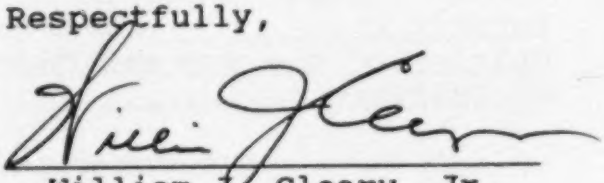
Appeal disagreed with Judge Todd is not a basis for refusing to apply res judicata.

Mr. Christiansen spent 11½ hours litigating the '93 assessment, and many more hours litigating the '95 assessment in supplemental proceedings in the '93 assessment action, where, as the statement of the case shows, the small claims judge found the '95 assessment invalid because the '93 assessment was invalid. Is it not time to say that fundamental fairness requires res judicata effect if small claims actions and their appeals are to serve their purpose, not only for Christiansen but for the countless millions who yearly invoke the small claims jurisdiction? Surely, this must be so where the court, as here, writes an opinion from which the facts, the issues, and the rulings can be ascertained without resort to extrinsic evidence; in such a case the doctrine should apply, not despite the limited jurisdiction, but because of it. See, Todhunter v. Smith, 219 Cal.690, 695 (1934) [final judgment of inferior court binding upon higher court]. Fundamental fairness requires it.

Conclusion

For all the foregoing reasons, petitioners PMC Trust and Paul M. Christiansen ask the court to grant their petition.

Respectfully,



William J. Cleary, Jr.

November 24, 1998

Appendix

Exhibit A:
Judge Todd's Opinion.....19

Exhibit B:
Opinion of the Court of Appeal.....23

Exhibit C:
Opinion of the Supreme Court
of California.....37

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ORANGE

Dept. SID 51

Court convened at_____M January 18, 1995, present
Hon. ROBERT C. TODD-Asgd., Judge: John Toulouse, Deputy Clerk_____,
Bailiff_____,
Reporter_____

and the following proceedings were had:

S23684 PMC TRUST V. FOOTHILL TOWN HOMES
Trial de Novo

The Court finds in favor of plaintiff and against Defendants.

The Board of Directors actions in levying the special assessment of $1,300.00 ($1,200.00) following the rainstorm damages suffered in 1992 and 1993, appears to be heavy handed and indicative of misfeasance in the use of authority. Yet, it cannot be denied that storm damage did occur to common areas of the Association.

It is also clear that the Board utilized its authority to include preventative measures as a part of its purported assessment. The Neufeld letter of June 24, 1993 was confirmatory of the approval of a $1,200.00 assessment, not a $1,300.00 assessment.

The are misstatements apparent in the evidence, relative to the status of the reserves, but they are not, by themselves,

determinative (Exhibits 2 and 3).

The storm damage itself was not reasonably foreseeable. However, Section 1366(b)(3), Civil Code, requires a resolution containing written findings as to the necessity of the extraordinary expense. The Board did not make those findings. Rain gutters that didn't previously exist were installed as a matter of prevention. Fencing that, from the association's own records (Exhibits 7 and D), were in disrepair, were added to units. Roadways required continual maintenance, and not all of the expenditures were related to the storm.

In addition, a serious question concerning the constitutionality of the violated code section exists. Section 1366.1, violated in the Court's opinion, is indicative of what the CC&R voter control was intended to be. If plaintiff were not entitled to the CC&R protections, however, he was entitled to the protections of the code.

Section 4, special assessments, pages 2 and 13 of CC&R's, seems otherwise controlling.

The depletion of the cash on hand was not an emergency. Restoration of the reserve was a practicality -- over a period of time.

The sum and substance is that if the Board had taken the time and effort to itemize, in its resolution, each extraordinary expense, after subtracting the annual contemplated (and established)

maintenance expenses, a reasonable assessment might have been accomplished if a one-time assessment was what the Board chose.

It is to be noted that this judgment is not binding except as to the immediate parties. Should another homeowner file a small claims action, the Association may wish to file a declaratory relief action and join that small claims action with it. Or simply file a declaratory relief action, at any time.

Plaintiff has paid the assessment of $1,300.00 and is entitled to judgment for that amount and for costs of suit. Judgment granted in favor of PCM trust Estate, by Paul Christiansen, Trustee, against defendant Foothills Townhomes Association #18 in the amount of $1,200.00 plus $35.00 costs, for a total of $1,335.00. Judgment is also granted for defendant Kurt Cornell against plaintiff PCM Trust Estate, by Paul Christiansen, Trustee. Appeal and Judgment on Trial de Novo transferred to South Municipal Court for enforcement of judgment. Exhibits to be maintained for 90 days before being returned to parties.

The clerk is to prepare judgment for signature by the court, and mail a copy of this minute order and judgment to each party. ENTERED: 1-18-95.

PCM Trust Estate by
Paul Christiansen, Trustee
Box 9145
South Laguna CA 92677

Foothill Town Homes Assoc.
c/o Tracy Ettinghoff, Esq.
30011 Ivy Glenn Dr., Suite 121
Laguna Niguel CA 92677-5016

CLERK'S CERTIFICATE OF MAILING (CCP 1013a)
I certify I am not a party to this case, am over age 18, and a copy of this document was mailed first class postage prepaid in a sealed envelope addressed as shown. Mailing and execution occurred on _____ at Santa Ana, California
ALAN SLATER, EXECUTIVE OFFICER-CLERK, ORANGE COUNTY SUPERIOR COURT--BY:
_____ Deputy
(Copy of Judgment included in this mailing)

MINUTE ORDER

COPY
NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

FOOTHILLS TOWNHOME ASSOCIATION, Plaintiff and Respondent	)	G022029 (Super.Ct.No. 768484)
vs.	)	OPINION
P.M.C. TRUST ESTATE, et al., Defendants and Appellants	)	

COURT OF APPEAL-4TH DIST.DIV.3
FILED
JUN 16, 1998
Stephen M. Kelly, Clerk
Deputy Clerk

Appeal from a judgment of the Superior Court of Orange County, Randell L. Wilkinson, Judge. Affirmed.

William J. Cleary, Jr. for Defendants and Appellants.

Brewer & Brewer and Templeton Briggs for Plaintiff and Respondent

The P.M.C. Trust Estate and Paul M. Christiansen, in his individual capacity and as trustee for the trust (collectively "Christiansen")[1] appeals the judgment entered against them in favor of Foothills Townhome Association (Foothills) involving nonpayment of homeowner association dues, contending the trial court erred by: (1) denying his demurrer and motion for summary judgment brought on the ground Foothills was collaterally estopped from claiming he owed the assessment; (2) granting Foothills motion for summary judgment; (3) denying his SLAPP suit[2] motion under Code of Civil Procedure section 425.16;[3] and (4) awarding excessive attorney fees. We affirm.

* * *

Christiansen owns a home[4] in an area subject to assessments by Foothills. In 1993, Foothills' board of directors voted to impose a $1,300 special assessment (the 1993 assessment) to replenish its reserve fund after severe storm damage had

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[1] We will use singular pronouns to refer to Christiansen because, as we understand it, he is the only human entity connected with the trust.

[2] The acronym SLAPP denotes strategic lawsuits against public participation.

[3] All statutory references are to the Code of Civil Procedure unless otherwise indicated.

[4] Apparently ownership has moved between Paul Christiansen and the trust on occasion.

necessitated many repairs. Christiansen paid the assessment under protest and then sued in small claims court for a refund. He obtained a judgment in his favor, and won again in superior court when Foothills sought a trial de novo.

Foothills refunded the money, but issued another $1,300 assessment for the same purpose (the 1995 assessment), this one approved by an overwhelming majority of the homeowners. Christiansen paid again under protest, and sought to set aside his satisfaction of judgment in the small claims court. One judge denied his request, but on rehearing, the judge who heard the initial trial on the 1993 assessment granted him relief. Christiansen levied on the association account and retrieved his $1,300 payment.

Foothills sued Christiansen in municipal court for the $1,300 and a declaration the 1995 assessment had been issued in compliance with applicable law. Christiansen demurred to the complaint on issue preclusion grounds, arguing the issues had been decided in his favor in the small claims action. The demurrer was overruled, as was his motion to dismiss the action under section 425.16 made on the ground the suit was brought to chill his free speech rights. Because Foothills requested declaratory relief, the matter was transferred to the superior court. There, Christiansen moved the court for summary judgment on the same issue preclusion grounds raised in the demurrer. Foothills filed a counter-motion for summary judgment on the ground there was no triable issue of fact concerning the

debt. The court granted Foothills' motion and awarded it over $10,000 in attorney fees.

I

Christiansen contends the trial court erred by denying his demurrer and summary judgment which rested on issue preclusion grounds.[5] His theory is the 1995 assessment was a reincarnation of the 1993 assessment, so the small claims judgment in his favor on the 1993 assessment bars Foothills from collecting on the 199 assessment. But a small claims judgment does not invoke issue preclusion as to later actions. (*Rosse v. DeSoto Cab Co.* (1995) 34 Cal.App.4th 1047, 1050-1053.)

Christiansen argues that rule does not apply where, as here, the superior court issues a written decision after a de novo small claims trial. Even if it does not, the superior court ruling dealt with the 1993 assessment, not the 1995

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[5] Christiansen argues these as separate points, but we consider them together because they can be resolved together as a matter of law. The record contains nothing indicating the demurrer was overruled, and we might reject the contention as to the demurrer on that ground (*California Novelties, Inc. v. Sokoloff* (1992) 6 Cal.App.4th 936, 945), but because Foothills does not contend otherwise, we will address the issue on its merits both as to the demurrer and the motion for summary judgment.

assessment.[6] Christiansen argues they were really the same assessment, but that question was never decided at the de novo proceeding. Christiansen could not rely on issue preclusion to successfully pursue a demurrer or summary judgment.

II

Christiansen argues the trial court erroneously granted Foothills' summary

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[6] In a separate but related argument, Christiansen asserts the trial court erroneously denied his motion to reconsider its summary judgment ruling. In the motion to reconsider, he urged the superior court actually considered the 1995 assessment during the trial de novo, and he appended declarations and documents to support his contention which had not been produced for the hearing on the summary judgment motion.

The trial court properly denied the motion for reconsideration. To merit reconsideration, a party must give a satisfactory reason why it was unable to present its "new" evidence at the original hearing. (*Mink v. Superior Court* (1992) 2 Cal.App.4th 1338, 1342.) Christiansen did not think the evidence was necessary at the first hearing. That reason was patently insufficient, and the trial court properly refused to reconsider its ruling. (See *Lucas v. Santa Maria Public Airport Dist.* (1995) 39 Cal.App.4th 1017, 1028.) Because the trial court did so, no evidence shows the superior court considered the 1995 assessment.

judgment. "A plaintiff seeking summary judgment meets its burden of showing that there is no defense to a cause of action by proving each element of the cause of action entitling it to judgment on that claim. [Citation.] Once the plaintiff has met that burden, the burden shifts to the defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. [Citation]" (*Recorded Picture Company [Productions] Ltd. v. Nelson Entertainment, Inc.* (1997) 53 Cal.App.4th 350, 360-361, citing §437c, subd. (o)(1).)

Christiansen asserts that even if his issue preclusion argument fails, there is a triable issue of fact concerning whether the 1995 assessment violated Civil Code section 1366.1.[7] That section provides, "An association shall not impose or collect an assessment or fee that exceeds the amount necessary to defray the costs for which it is levied." Christiansen reasons the assessment violated section 1355.1 because it was levied to replenish a reserve fund, it exceeded the amount necessary to pay for the storm damage because some of the fund expenditures had been for other reasons, and Foothills

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[7] Christiansen's manner of raising and arguing this issue makes it unclear whether he is raising the argument as part of his issue preclusion contention or separately. Out of an abundance of caution, we treat it as the latter.

could have replenished the fund over time.[8]

We have found no cases construing section 1366.1, and the parties do not suggest anything about the section's legislative history alters the plain language of the section. (*Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 131-132 [plain language of statute controls in the absence of compelling reasons].) The assessment was levied to replenish the fund after money was expended to pay for storm damage. Even if we consider as binding the superior court's finding at the de novo trial that the assessment would replenish the fund for non-storm related expenses as well, nothing about the facts indicate: (1) homeowner association reserve funds are improper;[9] (2) levying assessments to replenish such funds is impermissible; (3) Foothills' usual reserve balance was excessive; or (4) the amount of the assessment pushed the fund above its usual balance.

Thus, the evidence showed the

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[8] Christiansen makes passing reference to whether the assessment was in response to an emergency. That issue, presented by the 1993 assessment passed by Foothills' board, was mooted when the homeowners voted on the 1995 assessment. (See Civ.Code §1366 [emergency issue is only implicated in the absence of a homeowner vote].)

[9] Indeed, they would be desirable.

assessment was within the amount necessary to defray the costs for which it was levied -- the cost of replenishing the reserve fund. Whether the fund *could* have been replenished over time is irrelevant to whether the assessment exceeded costs for which it was levied. As a matter of law, an assessment does not violate section 1366.1 merely because the costs *could* have been recouped incrementally. Nothing in the language of the statute suggests that is so.

Foothills established[10] without controversion the assessment was passed by an overwhelming percentage of the homeowners for the purpose of replenishing its reserve fund. That evidence showed sufficient compliance with section 1366.1 to entitle it to summary judgment in the absence of rebuttal evidence from Christiansen.

III

Christiansen contends the trial court erred by denying the SLAPP suit motion under section 425.16[11]

Section 425.16 was enacted to combat frivolous lawsuits brought primarily to

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[10] Foothills did so primarily by relying on Christiansen's undisputed facts.

[11] As with the demurrer ruling, the record does not contain an order denying the motion, but we opt to consider the issue because Foothills does not complain.

chill the valid exercise of the constitutional right of freedom of speech and petition for the redress of grievances. (§425.16, subd.(a).) Subdivision (b) provides in relevant part: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Subdivision (e) defines "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" as including "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest."[12]

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[12] We quote subdivision (e) as it read in 1997 when Christiansen's motion was heard. An amendment effective January 1, 1998, added to the protected conduct "any other conduct in furtherance of the

We review the record independently to determine whether the trial court ruled correctly. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 653.) Christiansen alleges this suit was in retaliation for his opposition to Foothills; governing board and its actions, particularly concerning assessments. He does not allege any statements or writings he made in the course of these activities were made before an official proceeding or in connection with an issue under consideration in such a proceeding, as section 425.16, subdivision (e) requires, but he does assert Foothills' meetings could be considered "open to the public or a public forum" and his actions involved an issue of public interest. (§425.16, subd.(e).)

In *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, we construed the statute broadly and determined statements made by an employee to her employer in private opposing the employer's support for a battered women's shelter in the neighborhood fell under the statute's

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exercise of the constitutional right[s] of petition or...free speech in connection with a public issue or an issue of public interest." (Code Civ.Pro., §425.16, subd.(e), added by Stats. 1997, c. 271 (S.B. 1296), §1, West's Ann.Code of Civ.Proc., 1998 pocket part.) Because the additional language does not affect our analysis, we need not consider whether the amendment is retroactive to motions brought before its effective date.

purview. We found an action against the employee by the shelter for slander and related causes of action was meritless and ordered the trial court to grant the section 425.16 motion. (*Id.* at pp. 1174-1176; see also *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1044-1050; *Church of Scientology v. Wollersheim, supra,* 42 Cal.App.4th at pp. 650-651; *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 821 [cross-complainants conceded issue was public; compare *Linsco/Private Ledger, Inc. v. Investors Arbitration Services, Inc.* (1996) 50 Cal.App.4th 1633, 1638-1639 [narrow interpretation]; *Zhao v. Wong* (1996) 48 Cal.App.4th 1114, 1120-1121, 1129.)

Based on *Averill*, we conclude Christiansen's alleged activities involved matters of sufficient public interest made in a sufficiently public forum to invoke the protection of section 425.16. Nevertheless, his claim fails. SLAPP suits can conceivably be pleaded in terms of breach of contract or other valid actions. (See, e.g., *Wilcox v. Superior Court, supra,* 27 Cal.App.4th 809.) When considering a section 425.16 motion, a court must consider the actual objective of the suit and grant the motion if the true goal is to interfere with and burden the defendant's exercise of his free speech and petition rights. (*Church of Scientology v. Wollersheim, supra,* 42 Cal.App.4th at p. 652; see also *Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecommunications Engineers* (1996) 49 Cal.App.4th 1591, 1601-1603.) We conclude from our independent review that

Christiansen failed to meet his burden to show the lawsuit was brought to chill his first amendment rights. (*Wilcox v. Superior Court, supra,* 27 Cal.App.4th at pp. 819-820 [defendant bears initial burden to show the suit falls within the ambit of the statute].)

Foothills brought suit to collect on the 1995 assessment and obtain declaratory relief the assessment was valid, presumably to ensure the assessment could be collected against all of the homeowners. Christiansen did not show he was singled out for enforcement of the assessment. Indeed, he averred others had been pursued as well. Although those who were sued may have been members of the protesting group, that is not surprising since that is the group one would expect to withhold payment. Christiansen's allusion to tangential threatening comments by the spouse of a board member *after* the association filed suit does not change our view of the circumstances. Foothills' suit appears to be no more than a dogged effort to collect the assessment. To allow Christiansen to avoid payment of the assessment simply because he disagreed with Foothills would mean Foothills could never collect an assessment from him. (See *Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecommunications Engineers, supra,* 49 Cal.App.4th 1591, 1601-1603.)

Moreover, section 425.16 motions should not be granted unless the court finds the plaintiff's case is meritless. (§425.16, subd. (b).) As we determined in part I, Foothills' case had merit.

IV

Christiansen asserts the trial court awarded excessive attorney fees in an amount slightly over $10,000.[13] Determining the proper amount of attorney fees is within the court's broad discretion. (*Crawford v. Board of Education* (1988) 200 Cal.App.3d 1397, 1405-1406.) Christiansen complains the court should not have allowed a rate above $125 an hour, and the matter was only heard in the superior court because Foothills added a declaratory relief cause of action in bad faith. Nothing in the record shows the trial court abused its discretion in rejecting those claims.

The judgment is affirmed. Foothills is entitled to its costs on appeal.[14]

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[13] In his opening brief, Christiansen only refers to Foothills' pleadings concerning attorney fees. The trial court issued an order for Foothills to submit a new judgment with a space for attorney fees. The judgment in the record is signed and file stamped, but the award of attorney fees is left blank. We augmented the record, however, to include a copy of the order denying the motion to tax costs, except for a $120 reduction in attorney fees, and the memorandum of costs reflects $10,785 in attorney fees.

[14] Christiansen argues for the first time in his reply brief that the judgment must be reversed as to him individually because a deed attached to the complaint

WALLIN, J.

WE CONCUR:

SILLS, P.J.

RYLAARSDAM, J.

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shows he transferred ownership of the property to the PMC Trust. Because he gives no reasons why he did not raise the issue in his opening brief and does not suggest he raised it in the trial court, we decline to address the issue. (See *People v. Adams* (1990) 216 Cal.App.3d 1431, 1441, fn.2.)

Fourth Appellate District,
Division Three, No. G022029
S071970

IN THE SUPREME COURT OF CALIFORNIA

FOOTHILLS TOWNHOME ASSOCIATION, Respondent

v.

P.M.C. TRUST ESTATE Et Al., Appellants

SUPREME COURT
FILED
Sept -2 1998

Petition for review DENIED.

The requests for an order directing depublication of the opinion are denied.

GEORGE

Chief Justice